(2) Supreme Court, U.S.
FILED

Case No. 041334 MAR 17 2005

IN THE SUPREME COURT OF THE UNITED STATES OFFICE OF THE CLERK

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL OF FLORIDA,
Petitioners,

v.

TONY LEE NIX, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS

SUPPLEMENTAL APPENDIX

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IN THE SUPREME COURT OF THE UNITED STATES

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL OF FLORIDA,
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v.

TONY LEE NIX, *Respondent.*

INDEX TO SUPPLEMENTAL APPENDIX

Order of the United States District Court, Middle District of Florida
February 9, 2004, Case No. 3:03-cv-588-J-20HTS . SA-1 - SA-5

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE CITY DIVISION

TONY LEE NIX,

Petitioner,

v. Case No. 3:03-cv-588-J-20HTS

JAMES W. [SIC] CROSBY, JR.,
et al.,

Respondents.
_____/

ORDER

Petitioner initiated this action by filing a Petition for Writ of Habeas Corpus (Doc. #1) pursuant to 28 U.S.C. § 2254 on July 15, 2003. He was convicted of burglary of a dwelling and grand theft on September 26, 1997, and sentenced by the St. Johns County Circuit Court to 176.9 months incarceration on December 12, 1997.

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA). This law amended 28 U.S.C. § 2244 by adding the following subsection:

> (d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244 (d) (2003). Respondents contend, and this Court agrees, that Petitioner has not complied with the one-year period of limitation as set forth in this subsection. See Motion to Dismiss (Doc. #7) (hereinafter Motion to Dismiss), filed November 12, 2003.

Petitioner filed a direct appeal, and on December 29, 1998, the Fifth District Court of Appeal affirmed Petitioner's judgment of conviction. Ex.[1] B. Thus, Petitioner's conviction became final ninety days later on March 29, 1999, when the time for filing a petition for certiorari to the United States Supreme Court expired.[2] See Clay v. United States, 537 U.S. 522 (2003).

On December 18, 1999, 264 days after Petitioner's conviction became final, Petitioner filed a motion for post-conviction relief. Ex. D. The Petition was denied after an evidentiary hearing, the denial was affirmed on appeal, and a petition for discretionary review was dismissed on February 28, 2003. Ex. K. Assuming arguendo the latest possible deadlines, the Court has give Petitioner every benefit of the doubt by accepting that the one year period was tolled until February 28, 2003. At that point, one hundred days of the limitation period ran until Petitioner filed a Rule 3.800 motion on June 8, 2003. Ex. N. That motion was denied on June 16, 2003. Ex. O. Thus, Petitioner had one day left to file his federal petition in a timely fashion. The federal petition was due to be filed on June 17, 2003, and Petitioner did not file the federal petition until July 15, 2003. Thus, the one-year period expired prior to Petitioner filing his federal petition.

Petitioner was given the opportunity to address why the dictates of the one-year limitation period should not be imposed upon him. See the Court's Order (Doc. #6), filed October 1, 2003. On November 11, 2003, Petitioner filed his Traverse to the State's

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1 The Court hereinafter refers to the Appendix (Doc. #8), filed November 12, 2003, as "Ex."

2 In this case, Petitioner was not required to seek review from the Florida Supreme Court. The Florida Supreme Court did not have subject matter jurisdiction to review the district court's order because the district court per curiam affirmed the judgment of conviction without issuing a written opinion. See Fla. R. App. P. 9.030(a). In cases where review by the Florida Supreme Court is not available, an appeal of a district court opinion may be taken directly to the United States Supreme Court.

Response (Doc. #9) (hereinafter Reply), pursuant to the mailbox rule. Therein, he concedes that his federal petition is untimely; however, he asserts that he is entitled to some sort of "gateway through procedural default" because he was out of Florida custody from December 15, 1998, through January 25 or 26, 1999. During this time period his direct appeal became final, and he states that he was not aware of the finality of his direct appeal until he received service in March of 1999.

Construed liberally, the pro se Petitioner raises the issue of equitable tolling in this assertion. Equitable tolling is appropriate when a prisoner's petition is untimely "because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." Johnson v. United States, 340 F.3d 1219, 1266 (11th Cir. 2003) (citations omitted). The Eleventh Circuit has emphasized, however, that equitable tolling applies "only in truly extraordinary circumstances." Id. (citations omitted).

Here, the Court is of the opinion that the Petitioner has not shown that he is entitled to this extraordinary relief. The Court has already given Petitioner every benefit of doubt by concluding that one-year limitation period did not start to run for ninety days after the direct appeal was affirmed. See Motion to Dismiss at 4-5, where Respondents argue that the ninety-day period to seek a petition for certiorari should not be considered by the Court because the direct appeal did not contain federal claims.[3]

The one-year period did not start until after the conviction became final on March 29, 1999. Therefore, taking into consideration Petitioner's absence from the state and his receiving notice of the affirmance of appeal in March of 1999 will not benefit him further since that period of time is not being counted as running against him.

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3 The Court has assumed, for purposes of this opinion, the latest possible deadlines; however, these assumptions should not serve as precedent for future cases.

Furthermore, Petitioner has not shown an unconstitutional impediment to his right of access to the courts. See Adkins v. United States, 204 F.3d 1086, 1090 (11th Cir.), cert. denied, 531 U.S. 971 (2000). In sum, Petitioner has failed to show extraordinary circumstances which prevented him from filing a timely petition. Clearly, the burden is on Petitioner to make a showing of extraordinary circumstances, both beyond his control and unavoidable even with diligence, and this high hurdle will not be surmounted easily. The Court is not convinced the Petitioner has shown extraordinary circumstances that were both beyond his control and unavoidable even with diligence. Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999) (per curiam). Thus, he is not entitled to equitable tolling of the limitations period in the case at bar.

Petitioner has not shown any justifiable reason why the dictates of the one-year limitation period should not be imposed upon him. Accordingly, this Court will dismiss this case with prejudice pursuant to 28 U.S.C. § 2244(d).

Therefore, it is now

ORDERED:

1. The request to dismiss the Petition as untimely filed, contained within Respondent's November 12, 2003, Motion to Dismiss (Doc. #7), is **GRANTED**, and the Petition is **DISMISSED** with prejudice.

2. The Clerk of the Court shall enter judgment dismissing the case with prejudice and shall close the case.

DONE AND ORDERED at Jacksonville, Florida, this 9th day February, 2004.

Harvey E. Schlesinger
United States District Judge